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THE
AMERICAN LAW REGISTER.

MAY, 1868.

LIABILITY OF DOWRESS FOR TAXES ASSESSED DURING THE
HUSBAND'S LIFE.¹

JOHN HARRISON at his death was seised in fee of thirty lots in the city of New York. He was married on the 26th of November 1860, and died on the 5th of August 1861, having made his will, leaving all his real and personal estate to George Harrison and making him his executor.

At the time of the marriage there were upwards of \$11,000 of unpaid state, city, and county taxes on the thirty lots, which had been imposed for the years 1856, 1857, 1858, 1859, and 1860; during the year 1861 taxes to an amount exceeding \$2000 were assessed on said lots, which assessment was confirmed on the 20th day of September 1861; all these taxes remained unpaid at the death of John Harrison.

In November 1861, the devisee, by agreement with the widow, set apart ten of the lots to her as her dower, and retained the other twenty released from any claim on her part.

The personal property of John Harrison, which came into the hands of George Harrison as legatee and executor, was sufficient to pay all the taxes on John's estate at the time of his death, but not sufficient to pay the taxes and all the other debts of John.

¹ We are indebted to Hon. CHARLES P. KIRKLAND, of New York, for the following case and opinion, upon a novel point in the law of Dower. ED. AM. LAW REG.
VOL. XVI.—25 (385)

After the ten lots were set apart to the widow, as above stated, George Harrison paid several thousand dollars of the taxes above mentioned, partly out of the personal property of John, and partly by sale made by order of the surrogate, of some of the twenty lots above mentioned, as released by the widow, and he then brought an action to recover from her the proportion of taxes due on the lots set apart to her.

The action was referred to Hon. CHARLES P. KIRKLAND, who reported his opinion as follows:—

The only question really in litigation between the parties in this action is, Whether the defendant is bound to contribute toward the payment of the taxes which existed at the time of the marriage and at the time of her husband's death, on the premises of which he was seised during the coverture. In other words, Whether a dowress, as between her and the devisee, legatee, and executor of her husband (the same person being devisee, legatee, and executor), is bound to pay or contribute toward the payment of any taxes existing at the time of her marriage and of the death of the husband, on the premises assigned to her for dower, or on any of the premises of which the husband was seised during the coverture.

It is a singular and interesting fact that, though this question must have very frequently arisen, yet no adjudicated case, deciding the precise point, has been cited by the learned counsel who conducted the case before me, nor is the rule governing the case stated by any elementary writer, so far as their examinations have discovered; nor have my researches been any more successful. This fact gives additional interest to the question and leaves it to be decided purely on *principle*.

I. Estates in dower have always been regarded with great favor *in the law*, and the widow's rights have been watched over and protected with jealous care.

The tenant in dower is so much favored that it is the common by-word in the law, that the law favors three things: (1) life; (2) liberty; (3) dower: Bacon on Uses 37.

From the earliest period of the existence of the common law, a very extraordinary favor was bestowed in the administration of justice on this provision for a wife surviving her husband: Park on Dower 2.

Dower is, indeed, proverbially the foster-child of the law, and

so highly was it rated in the catalogue of social rights as to be placed in the same scale of importance as life and liberty.

Favorabilia in lege sunt vita, fiscus, dos, libertas, was the maxim of the courts: Id. 3.

Dower is often the only certain resource of widowhood; it has for its object the sustenance of the widow and the nurture and education of her children: Id. 3, 5.

This doctrine has continued from and anterior to the time of Bacon down to this day; and the most modern cases repeat the proposition that the widow's estate in dower is favored in the law: *Matter of Sapperly*, 44 Barb. 370; s. L., 13 Barb. 106, and 4 Barb. 20.

So carefully, indeed, is this right protected, that a deed, given *before marriage*, by a husband to his daughter without consideration, was adjudged *void* against the widow's *dower*, as well as against a subsequent mortgage: 5 Johns. Ch. 482.

We thus see the estimation in which this right has always been, and still is, held by the law; and we are thus furnished with a very clear as well as a very certain light to guide us to a proper conclusion on this occasion.

II. On *general* legal principles, irrespective of the above considerations, the dowress should have preference to the devisee:—

(1.) As *between him and her*, she well may be regarded, in a legal sense, as a purchaser for a valuable consideration, whereas he is purely and merely a volunteer, the bare recipient of a gift. The law in such cases is uniform; it will always protect the former as against the latter, whenever such protection is possible.

The wife is the helpmate of the husband; she stands towards him in the most intimate and confidential of all human relations; in the performance of her share of duty, she aids him in the acquisition of his property; she is in every sense, practical and legal, a *meritorious* (as distinguished from a *voluntary*) party in regard to her estate in dower.

It would be repugnant to every sentiment of justice and of right, that a party thus situated should not in every possible way, have preference to a party who is a mere volunteer, a gratuitous donee, without the slightest *meritorious* claim, and such a party is this devisee.

(2.) The tax was laid and assessed on the vested, *existing*

visible estate of the husband, not on the inchoate, intangible, merely possible estate of the wife.

III. On examining carefully the various provisions of the statute law of this state, we find enough to justify us, nay to compel us, irrespective of the foregoing considerations, to carry into *practical* effect, the doctrine that dower is an estate "favored in the law."

(1.) The revised statutes provide that executors and administrators shall pay the debts of the deceased in the following order.

(1.) Debts due to the United States.

(2.) Taxes assessed on the estate of the deceased prior to his death.

(3.) Judgments, &c., &c.

The duty and the burden of paying taxes are thus plainly imposed on the representative of the *personal* property: as between the real and the personal estate, the latter is charged with this burden, to the exoneration of the former.

It is very clear, that in no event could the party entitled to the personal estate, call on an heir or devisee for repayment or indemnity, not even if the personal estate were large and valuable, and was entirely exhausted in the payment of taxes, the real estate being also very valuable and entirely free from encumbrance. If, in such case, neither heir nor devisee could be required by the party entitled to the personal property, to pay, or even to contribute toward the payment of the taxes, by parity of reason, indeed, for much stronger reason, a dowress could not be so required. The payment thus made would result to the benefit of the heir by the extinguishment of the encumbrance on his estate; by what reasoning can it be shown, that it should not also, and equally, result to the benefit of the dowress? More emphatically must this be so where, as in the present case, the personal estate was *sufficient* to pay the taxes.

It was thus the *duty* of the executor to pay the taxes; he can make no claim to them, or any part of them against the dowress?

The case here is rendered still stronger, if any necessity existed for further reasoning, by the fact that the devisee, the legatee, the executor, are one and the same person.

(2.) Personal property is without doubt the *primary* fund for the payment of taxes. This is manifest from the provisions of

the act just cited, and equally, if not more clear, from the provisions of another act which makes it the duty of the supervisors to issue a warrant to the collector for the collection of the tax, and in case of non-payment, makes it the duty of the collector to levy the same by distress and sale of the *goods and chattels* of the party taxed, or of any goods and chattels *in his possession*; if the collector fails to collect, he is to make return to the county treasurer, and he subsequently returns to the comptroller, who then takes the requisite steps to collect, &c.: 1 R. S. Edm. ed. 367, s. 37; 369, s. 2; 374.

In this very case if the officers charged with the collection of the taxes, had done their duty, it cannot be doubted that the taxes in question prior to 1861, would have been collected from or paid by the husband in his lifetime. At any rate, it is certain that, during the husband's life, his goods and chattels, and after his death, his personal property, is the primary fund for the payment of taxes.

(3.) The debt was the debt of the husband to be paid by him, and not the debt of the wife to be paid by her; if the officers of the law neglected to collect, and the husband neglected to pay, the consequence of these defaults in duty on the part of the officers, and of the husband, surely ought not to be visited on the wife, when she becomes a *widow*.

(4.) The act for the admeasurement of dower strongly confirms the proposition that the dowress is not to be charged with the taxes assessed, prior to or during the coverture: 2 R. S. 491, ss. 13, 17, 18, 1st ed.

The 13th section provides that the admeasurers shall take into consideration certain improvements made on the premises; and it provides for no other *deduction* from the value of the premises to be assigned for dower; it not only does not charge the taxes on the dowress, but by implication exonerates her from them, for the 18th section provides that the widow may bring ejectment for the premises admeasured to her and may hold the same during life, subject to the payment of all *taxes* and charges accruing thereon *subsequent* to her taking possession.

On the general rule in the construction of statutes (as well as of contracts) *expressio unius est exclusio alterius*; and, therefore, by providing expressly that she should be liable for *subsequent* taxes, the just, if not the necessary, inference is, that she

is not to be liable for such as existed previous to her taking possession.

It is difficult to imagine a case to which the rule of *expressio unius, &c.*, could be more justly and more properly applied than the case now under consideration.

I am thus irresistibly led to the conclusion, that the defendant is not, as between her and George Harrison and his representatives the plaintiffs, liable or bound to pay any part of the taxes existing at the time of her marriage, or at the time of the death of John Harrison; and, of course, if any such taxes have been paid by her out of her property, that she has the right to claim and recover them from the plaintiffs.

IV. It must be remembered, that the question here is between the dowress and the *devisee* of her husband; not between her and *creditors* having a lien on her husband's real estate, existing at the time of the marriage. The latter have preference to her, and her dower is subject to all such liens. This proposition is too clear and too reasonable to require the citation of authorities on the subject—of course her dower rights are subject to all existing taxes *whenever* imposed; the practical meaning of which is, that the government (state or municipal) has the right to collect the taxes out of the estate irrespective of dower.

If the taxes are collected in whole or in part, out of the interest or estate of the dowress, whether actually set apart to her after her husband's death or not, she has her resort to the heir, devisee, or executor, as the case may be, for reimbursement.

RECENT AMERICAN DECISIONS.

Supreme Court of Missouri.

EDWARD S. ROWSE v. WASHINGTON UNIVERSITY.

A legislative concession embraced in the charter of a corporation perpetually exempting its property from taxation, without a sufficient corresponding consideration yielded by the corporation, is revocable at the pleasure of the state. And the act of the state in revoking such a concession, is not unconstitutional as impairing the obligation of a contract.

Henry A. Clover, for plaintiff in error.

Henry Hitchcock, for defendant in error.